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## Article 23: Equality between women and men

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# Article 23 Equality between women and men

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Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.

## Text of Explanations to Article 23

The first paragraph has been based on Articles 2 and 3(2) of the EC Treaty, now replaced by Article 3 of the Treaty on European Union and Article 8 of the Treaty on the Functioning of the European Union which impose the objective of promoting equality between men and women on the Union, and on Article 157(1) of the Treaty on the Functioning of the European Union. It draws on Article 20 of the revised European Social Charter of 3 May 1996 and on point 16 of the Community Charter on the rights of workers.

It is also based on Article 157(3) of the Treaty on the Functioning of the European Union and Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The second paragraph takes over in shorter form Article 157(4) of the Treaty on the Functioning of the European Union which provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. In accordance with Article 52(2), the present paragraph does not amend Article 157(4).

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## A. Field of Application of Article 23

**1** Article 23 has a potentially limitless field of application. Because the division of labour and other roles between women and men lies at the core of any human society, any policy or piece of legislation will impact upon it, or be impacted upon by it. The duty to ensure equality between women and men thus affects any activity the EU engages in as well as any implementing policies of its Member States.

**2** The EU Treaties and their predecessors have from 2000 contained explicit competences explicitly aimed at equality of women and men, partly preceded by competences contained in the Social Policy agreement attached to the Treaty of Maastricht. The oldest of these is Article 153 (1) letter (i) TFEU, which repeats the wording of Article 2 (1) Social Policy Agreement (1992)<sup>1</sup> and allows the EU to complement and support the activities of its Member States in the field of “equality between men and women with regard to labour market opportunities and treatment at work”. Further, Article 157 (3) TFEU provides for the adoption of “measures to ensure the application of the principle of equal

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<sup>1</sup> The Social Policy Agreement was concluded in 1992 by 11 out of the then 12 Member States, and annexed to the Treaty of Maastricht through a protocol. This enabled the Member States to bring forward EU social policy in parallel with the founding of Economic and Monetary Union, although the UK was strictly opposed to it. When the Treaty of Amsterdam was negotiated the UK government had changed, and the provisions of the Social Policy Agreement were integrated into the then Treaty on European Community. The protocol and the agreement are reprinted in 1992 OJ C 224/126-129.

opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.” This provision was first introduced as Article 141 (3) with the Treaty of Amsterdam (1997/1999).<sup>2</sup> Also, Article 19 TFEU, first introduced by the same Treaty as Article 13 EC, enables the EU to adopt legislation combating discrimination based on sex beyond the field of employment. All these competences can be used to take measures that contribute to ensuring equality between women and men.

**3** However, the EU still lacks competences in some field decisive for equality between women and men. Before the Treaty of Lisbon, most core feminist legal policy fields<sup>3</sup> such as politics on gendered violence within the family or legal restrictions of the relation of mothers and children were outside the competence sphere of the European Communities. The integration of what remained of the “Third Pillar” into the mainstream of the European Union polity partly changed this. As the EU now has a competence for cooperation in police and criminal matters, it is also able to ensure equality of women and men in this field if it acts. Similarly, coordination in civil justice may comprise some elements of family law, which mainly remains a national competence. However, some policies of core relevance for equality of women and men in European societies still lie beyond the EU’s core legislative competences, while laws and policies relating to economic integration and the newly reinforced social goals of the EU will also impact upon equality of women and men. Even beyond its legislative competences, the European Union engages in coordinating policies of its Member States, notably through the Open Method of Coordination. While the resulting documents and policy processes are not legally binding, they still have considerable impact on Member States’ policies. Accordingly, Charter provisions must also be complied with when engaging in such policy processes. Policies pursuing any other aim can and must be scrutinized in order to also promote equality between women and men under Article 23 CFREU.

**4** Further, the applicability of Charter depends on the categorisation of provisions as principles or rights. Principles can only be used to interpret EU legislation, but rights may be directly enforceable. (Article 52 (5) CFR EU). Regarding Article 23, the explanations helpfully state that it consists of rights and principles, without any reference to its individual articles.<sup>4</sup> As will be shown below, both paragraphs are judicially cognisable in some aspects, while the main relevance especially of Article 23 (1) lies in programming the interpretation and application of other Charter provisions and the provisions of the EU Treaties as well as programming politics.

## **B. Relationship of Article 23 with other provisions of the Charter**

**5** Laws and policy relevant to equality of women and men can be seen as embracing two dimensions – a negative dimension under which discrimination against women on grounds of sex should be prohibited and a positive dimension under which measures are taken to ensure equality between the sexes.<sup>5</sup> Within the Charter, the non-discrimination dimension is primarily addressed by **Article 21**,

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<sup>2</sup> The Treaty of Amsterdam was adopted in 1997, but its coming into force was delayed by referenda held in Denmark and Ireland before those Member States ratified the Treaty. It entered into force in May 1999.

<sup>3</sup> *Feminist Legal Studies*, ed. by Joanne Conaghan (London: Routledge, 2009), 1-IV.

<sup>4</sup> Explanations (\*) Relating to the Charter of Fundamental Rights, (2007) OJ 303/17, 32

<sup>5</sup> Political science literature classically distinguishes three dimensions: non-discrimination law, positive action and gender mainstreaming Theresa Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies* (London: Routledge, 1998)..

while Article 23 comprises one paragraph each on ensuring equality and allowing positive action. However, the fact that for equality between women and men there is a special provision must also impact on the interpretation and application of the general non-discrimination clause. Article 23 thus constitutes a binding guideline for interpretation and application of Article 21 as far as equality of women and men is concerned.

**6** The term equality used in Article 23 might be reminiscent of **Article 20**, which also uses the term “equality” in its heading. However the text of that provision only uses the adjective equal, thus demanding equality as consistency<sup>6</sup> in application of the law. In contrast to the obligation of administrators and courts to use the same standards for everyone in applying the law, the grand aim of equality of women and men aims at changing socio-economic reality to achieve de-facto equality of the sexes.

**7** The principle of ensuring equality between women and men also constitutes a horizontal principle, which has become known as the principle of “**gender mainstreaming**” (see below paragraph **31**). As such, it relates to any provision of the Charter, and demands that it is interpreted in ways that ensure equality between women and men. Two examples may illustrate the consequences of this.

**8** Reading Charter provisions in line with women’s equality is particularly challenging where the protection of a specific right is prone to entrench **traditional role expectations imposed on women**, which often relate to women working more and / or for less recognition than men, or to expecting women to endure violence and other restrictions of their personal freedom. In international human rights law, tensions between protection of minorities and equality of women and men as well as frictions between freedom of thought, conscience and religion and gender equality have long been acknowledged as a problem.<sup>7</sup> Accordingly, there is a potential tension between Article 23 and **Article 22**, if the latter is read as not only protecting diversity, but also cultural or religious groups.

**9** Further, there is a potential tension between **Article 33** and Article 23. Only women can give birth, and this specific gift is made to impact on equality between women and men by social arrangements. Frequently mothers are held responsible for children beyond the act of birthing, and in extreme cases expected to deliver all the work connected to child-raising without being paid for it, to give up any employed work or any other ambition until their children can fend for themselves. Maternity can thus form a burden shackling women to a life of dependency from others, and limit their ability to be self-contained and to choose activities other than child minding and housework for their children and their father(s). Article 33 Charter, in **protecting families** unconditionally, does not refer to those and other damaging effects of women’s equality potentially flowing from the organisation of family life.

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<sup>6</sup> Sandra Fredman, *Discrimination Law*, 2nd edn (Oxford: Oxford University Press, 2011) (pp. 8-14)., Dagmar Schiek, 'Torn between Arithmetic and substantive equality?', *International Journal of Comparative Labour Law and Industrial Relations*, 18 (2002a)), 149-68 (p. 150).

<sup>7</sup> See CCPR General Comment No 28, Article 3 (The Equality of Rights between Men and Women), adopted by the Committee at its 1834<sup>th</sup> meeting on 29 March 2000, no 32 and 21, on potential tensions between sex equality and religious freedom see Aileen McColgan, 'Class wars?: religion and (in)equality in the workplace' , *Industrial Law Journal*, 38 (2009), 1-29., on conflicts between minority protection and women’s rights see Susan Moller Okin, 'Mistress of Their Own Destiny. Group Rights, Gender, and Realistic Rights to Exit', *Ethics*, 112 (2002), 205-30..



**10** Article 33 paragraph 2 of the same provision affords “everyone” rights to **maternity leave**, protection against dismissal on grounds of maternity and to parental leave – although any maternity rights can only be enjoyed by women. Its focus on leave is also unnecessarily narrow: reconciliation of paid work and unpaid work in families<sup>8</sup> could also be achieved by demanding that the organisation of paid work and publicly financed child care should leave sufficient time for mothers and fathers to care for their children without reducing their paid work or any other career beyond child-minding and housework. There is thus a potential tension between Article 33 and Article 23. This tension can be dissolved by interpreting Article 33 in line with Article 23 as to demand ways of protecting families and reconciliation that ensure equality between women and men at the same time. Other ways of protecting families and reconciliation would be unlawful as contradicting Article 23.

## C. Sources for Article 23 rights

### I. Council of Europe

**11** The **ECHR** does not contain a specific clause on any duty to ensure gender equality, which is thus only one element within the general equality clause of Article 14 ECHR, now transversally applicable under protocol number 12 to the ECHR. The ECHR’s lack of acknowledging any separate dimension of women’s equality is also mirrored in the ECtHR’s case law, which only started to address inequality between women and men as late as 1985, and still has to develop case law on issues such as positive action.<sup>9</sup> The field of equality between women and men is clearly one where EU law traditionally has provided more extensive protection than the ECHR (Article 52 (3) CFR EU).

**12** However, other instruments of the Council of Europe embrace equality between women and men more fully. Article 20 of the **Revised European Social Charter** provides:

With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

- a) access to employment, protection against dismissal and occupational reintegration;
- b) vocational guidance, training, retraining and rehabilitation
- c) terms of employment and working conditions, including remuneration;
- d) career development, including promotion.

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<sup>8</sup> On this principle see in more detail Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Basingstoke: Palgrave MacMillan, 2010). and commentary to Article 33

<sup>9</sup> On a comparison between ECtHR and ECJ case law on equality between women and men see Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review*, 8 (2008), 647-82. and Ivana Radačić, 'The European Court of Human Rights' Approach to Sex Discrimination', *European Gender Equality Review*, 2012, 13-22.

**13** The Council has recently adopted a **special convention on combating of violence against women**, the Istanbul Convention, which will enter into force once 10 state parties have ratified it. Presently, only three state parties have ratified the convention.<sup>10</sup>

## II. United Nations

### 1. General human rights instruments

**14** As many national constitutions in Europe, the **UN Covenants on Civil and Political Rights (CCPR) and on Economic, Social and Cultural Rights (CESCR)** each include a specific clause on equality between women and men in addition to its general prohibition of discrimination on a number of grounds. The identical Articles 3 require state parties “to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” These follow the equally identical Article 2 under which state parties “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The structure of the rights guaranteed in Article 21 and 23 CFREU mirrors this layout. In contrast to the CFR EU, these provisions limit their scopes to the rights protected in both the Covenants and have been considered as parasitic as a consequence.<sup>11</sup> Only the CCPR contains an independent prohibition of discrimination, within which sex is named as one of the grounds on which discrimination is prohibited.

### 2. The International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW)

**15** The UN main instrument in the field of equality of women and men goes much beyond a mere obligation to ensure equality and provide for special measures in favour of women. This convention was the first to establish an explicitly asymmetric approach to equality rights. Its Article 1 defines discrimination against women as

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

**16** Article 4 specifies that neither “temporary special measures aimed at accelerating the de-facto equality between men and women” nor “special measures aimed at protecting maternity” shall be considered as discrimination in the sense of the Convention. As regards measures aimed at accelerating de facto equality, the Convention specifies that these must be discontinued when (not if) the objectives of equality of opportunity and treatment have been achieved.

**17** These provisions are frequently seen as going beyond the limited space the Court of Justice of the European Union has allowed for positive action in EU law, which of course raises the question in how

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<sup>10</sup> CETS 210. The convention was adopted on 11 April 2011, and opened for signature on 11 May in Istanbul, current status is listed here: [http://www.coe.int/t/dghl/standardsetting/convention-violence/convention\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/convention_en.asp)

<sup>11</sup> Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2005) (p. 13)..

far the more restrictive approach of EU law towards “positive action” may be in conflict with the CEDAW, and what consequences this may have (below paragraph 49).

### III. European Union

**18** Gender equality is frequently considered as one of the best developed aspects of EU law,<sup>12</sup> ranging from the most developed field of social policy to an important human rights policy subject<sup>13</sup> and the embodiment of developing innovative ways to regulate, such as the principle of gender mainstreaming.<sup>14</sup> Accordingly, there are numerous emanations and assertions of this principle in European Union law and policy, including so called soft law instruments, which are not legally binding, but must be drawn upon when interpreting EU law. As concerns the latter category, the Community Charter of Fundamental Rights of Workers proclaimed

16. Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed.

To this end, action should be intensified wherever necessary to ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development.

Measures should also be developed enabling men and women to reconcile their occupational and family obligations.

This instrument was solemnly declared by the then EU Member States in 1989, with the UK’s abstention.<sup>15</sup>

**19** Long before the Community Charter and the CFREU were adopted, equal treatment of men and women had been acknowledged as one of the general principles of Union law. The Court issued the pivotal Defrenne II ruling in 1976,<sup>16</sup> just after the Council had agreed that “achieving equality between men and women” in the world of work should be one of the priorities of its social action programme.<sup>17</sup> Community legislation relating to this aim focused on equal treatment between women and men, i.e. non-discrimination rather than equality, but stressed that its purpose was to “put into

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<sup>12</sup> On the history of EU gender equality law see Tamara Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards', *Maastricht Journal of European and Comparative Law*, 12 (2005), 307-25. and the contributions to the special issue she is introducing in this article, see also Sevil Sümer, *European Gender Regimes and Policies* (Farnham: Ashgate, 2009) (pp. 59 - 85)..

<sup>13</sup> The elegy in the relevant chapter of one of the predecessors of this volume is characteristic in maintaining that “gender equality is the most robust and highly developed aspect of European Union social policy. While other areas of social policy are characterised by shared competences and flexibility of instruments, gender equality has been described as ‘federalism encapsulated’ [ ] long based on an ethic of enforceable individual rights invocable against Member States and private individuals.[ ]” Catheryne Costello, 'Gender Equality in the Charter of Fundamental Rights of the European Union', in *Economic and Social Rights Under the Eu Charter of Fundamental Rights: A Legal Perspective*, ed. by Tamara Hervey and Jeffrey Kenner (Oxford: Hart, 2003), pp. 111-37 (pp. 111-112, references omitted)..

<sup>14</sup> Fiona Beveridge and Samantha Velluti, *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Aldershot: Ashgate, 2008)..

<sup>15</sup> Social Europe 1/90, p. 45

<sup>16</sup> Case 43/75 Defrenne II [1976] ECR 455

<sup>17</sup> (1974) OJ C 13/1

effect the principle of equal treatment” (Article 1 (1) Directive 1976/207).<sup>18</sup> Even after legislation in the social policy field came to a halt, legislation regarding sex equality continued to flourish. Today, the purpose of such legislation is sometimes a dual one. Thus, Directive 2006/54<sup>19</sup> aims to “ensure the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation” (Article 1 (1)).

**20** This development reflects the incremental progress of primary EU law towards recognising equality between men and women as an aim to be pursued, rather than mere equal treatment. The Treaty of Amsterdam introduced equality between men and women as an aim of the Community (Article 2 EC), and this aim is maintained in Article 3 (3) TEU. The Treaty of Amsterdam<sup>20</sup> also introduced the Community’s obligation to “aim to eliminate inequalities, and to promote equality between men and women” in all its activities (Article 3 (2) EC, now Article 8 TFEU). The same Treaty introduced into Article 141 (4) EC the “view to ensuring full equality in practice between men and women” (now Article 157 (4) TFEU). This clause did not prevent the EU legislator from maintaining a focus on equal treatment. For example, the youngest sex equality Directive, though based on Article 157 (3), does not reaffirm the obligation to ensure full equality between men and women, but is restricted to mere equal treatment (Directive 2010/41).<sup>21</sup>

**21** Accordingly, Article 23 CFREU is underpinned by primary and secondary EU law, both as a right and as a principle. It reinforces the heightened position of gender equality in EU law by also giving this constitutional principle<sup>22</sup> an elevated position within the Charter. The Charter does not offer any comparably all-encompassing provisions relating to other inequality. Given the elevated relevance of gender equality in EU law, a commentary on Article 23 CFREU will always attract criticism for not covering everything which was ever discussed in this field. The following sections maintain the focus on what should be the function of a commentary: on exegesis of the positive law in context with its purposes, adding some examples of practical applications.

## D. Analysis

### I. General Remarks

Article 23 contains two profoundly different paragraphs: paragraph 1 subjects the EU and its Member States when implementing EU law to the positive obligation of ensuring equality between women and men in all areas, while paragraph 2 contains a clarification relating to positive action,

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<sup>18</sup> Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (1976) OJ L 39/40, now superseded by Directive 2006/54/EC

<sup>19</sup> Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (2006) OJ 204/23.

<sup>20</sup> (1997) OJ C 340/1

<sup>21</sup> Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, (2010) OJ 180/1

<sup>22</sup> Sophia Koukoulis-Spiliotopoulos, 'The Amended Equal Treatment Directive (2002/73): an Expression of Constitutional Principles/ Fundamental Rights', *Maastricht Journal of European and Comparative Law*, 12 (2005), 327-68 (pp. 331-36).

seemingly phrasing specific advantages in favour of women as an exception to the principle of equality. Accordingly, the structure maintained in commenting other articles is of limited use to this provision, which requires a specific commentary for each of its paragraphs.

## II. Paragraph 1

“Equality between women and men must be ensured in all areas, including employment, work and pay.”

### 1. Women’s rights or equality between women and men?

**22** Academic and political debate on women’s rights is rife with conceptual schism on the question whether women’s rights should be related to men’s rights, or to any notion of equality between women and men.<sup>23</sup> **Women’s law**, as for example introduced by Tove Stang Dahl,<sup>24</sup> does not necessarily relate to women and men. Instead it pursues the “objective to improve the position of women in law and society”,<sup>25</sup> an objective that has also been characterised as lying at the base of feminist legal studies.<sup>26</sup> From this perspective, women’s rights would aim at enhancing women’s capability of governing their own lives in interrelation with others.<sup>27</sup> Any reference to men is not necessarily helpful for achieving that aim, but may rather betray women’s rights, because it implies for women to assimilate to a male norm. For example, if rights must always be granted to women and men in equal measure, women could not derive rights from birthing or nursing children, as this is something men cannot do. Granting rights only for “those women who are able to act in the same way as men” is thus a severe critique of EU gender policies.<sup>28</sup> Women’s law seems to offer an alternative to this by focusing on women instead of men. Article 23 CFREU does not embrace this notion, though.

**23** Both women’s law and the legal strive for equality between women and men can further be criticised as being implicitly assimilationist for the mere reason that it focuses on **women as** a seemingly **essentialist category**, while there are as many differences between women as between women and men. Especially the Nordic model of women’s law has been so criticised: while its policy towards equalising the sexes may imply a movement towards each other rather than a movement of women towards men, it still maintains the perspective that differences between women and men are the

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<sup>23</sup> As indicated in Aileen McColgan, *Women under the Law: the False Promise of Human Rights* (Essex: Longman, 1999).

<sup>24</sup> Tove Stang Dahl, *Introduction to Women's Law* (Oslo: Norwegian University Press, 1987).

<sup>25</sup> Anne Hellum, 'CEDAW and the discipline of women's law: Continuity and change in the understanding of gender and law', in *Scandinavian Women's Law in the 21st Century*, ed. by Ruth Nielsen and Christina Tvarnø (Copenhagen: DJØF, 2012), pp. 31-61 (p. 32).

<sup>26</sup> Eva-Maria Svensson, 'Is there a Future for Scandinavian Women's Law?', in *Scandinavian Women's Law in the 21st Century*, ed. by Ruth Nielsen and Christina Tvarnø (Copenhagen: DØJF, 2012), pp. 15-29 (p. 25). Arguably, this is an outsider view. Insider feminists are prone to much more complex views. For a statement of Law, Gender and Sexualities

<sup>27</sup> A similar starting point is taken by Susan Moller Okin, 'Mistress of Their Own Destiny. Group Rights, Gender, and Realistic Rights to Exit', *Ethics*, 112 (2002), 205-30.

<sup>28</sup> Sylvia Walby, 'The European Union and Gender Equality: Emergent Varieties of Gender Regimes', *Social Politics*, 11 (2004), 4-29 (p. 5). Walby uses the rest of the article to de-construct this criticism and to defend the view that the EU has indeed achieved much more than a merely assimilationist gender equality regime.

main ones to be overcome,<sup>29</sup> potentially resulting in neglecting differences between.<sup>30</sup> Although Article 23 maintains the perspective of equality between women and men, its positioning behind the general non-discrimination clause of Article 22 CFREU implies that it should also be read in a coherent way with this provision. Accordingly, while striving for equality between women and men, the diversity within these categories must be acknowledged when interpreting and applying Article 23 CFREU.

## 2. Women and men - notions

**24** Further, it could be questioned why Article 23 CFREU uses the very categories “women” and “men”. Sexualities theory and feminism have long questioned whether this binary model of gendered reality adequately mirrors the reality of humankind, or whether it is not altogether a social construct. Nature does not always conform to the desire of categorising people as either woman or man. Whatever the alleged biological base of this categorisation - chromosomes, outer genitals, secondary sex identifiers – children are born in more than two varieties. In a society which insists on two sexes only, this creates problems for those falling between the categories. Children who do not dispel the expected sex categories at birth are frequently still altered by risky surgery. People who perceive themselves as belonging to a different gender than their bodies suggest often too feel compelled to seek surgery with all its risks.<sup>31</sup> Categorizing people into women and men is thus not a biological fact but rather a social convention, which is closely linked to women and men performing different roles in society, including the so called private sphere. There are of course some biological differences between women and men, mainly relating to the ability to give birth. Predominantly, humans are brought up as women and men and consequently most embrace one of these identities and identify with the corresponding values, roles and life styles. Mentioning only women and men, Article 23 CFREU latches onto those social conventions based on biological difference. Accordingly, it is important to read the notions of women and men in Article 23 as social constructs rather than essential categories.

**25** In academic writing as well as in EU policy documents, the notion “**gender**” is frequently used in addition to sex in order to underline the social construction of women and men. The notion gender expresses that organising society around the assumed two biological sexes and their different roles is not a fact of nature, but a social convention.<sup>32</sup> As social convention, gender is built around social expectations of maintaining a certain organisation of society, which is at the same time closely aligned with an unequal division of labour and resources between those categorised as male and fe-

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<sup>29</sup> This is also implied by the slogan “women are the majority, not a group”, which was used during the negotiations for the Constitutional Treaty in order to support the enhanced notion of gender equality among all the different equalities.

<sup>30</sup> Anne Hellum, 'CEDAW and the discipline of women's law: Continuity and change in the understanding of gender and law', in *Scandinavian Women's Law in the 21st Century*, ed. by Ruth Nielsen and Christina Tvarnø (Copenhagen: DJØF, 2012), pp. 31-61.

<sup>31</sup> There is a growing body of literature on transsexual and transgender people. For an overview considering these problems as part of the gender node see Silvan Agius and Christa Tobler, *Trans und intersex people. Discrimination on grounds of sex, gender identity and gender expression* (Brussels: European Commission, 2011). with numerous academic references.

<sup>32</sup> See for example Sevil Sümer, *European Gender Regimes and Policies* (Farnham: Ashgate, 2009) (pp. 5-6, with further references).

male, and a certain structure of families as the basis for division of labour and organisation of sexuality. Gender thus can be read as a node<sup>33</sup> including notions traditionally referred to as homosexuality and heterosexuality, for example, and comprising trans- and intersex persons, who do not fit neatly the categories of male and female. Article 23 CFREU is nevertheless focused on women and men, and does not include those notions explicitly. Any wider notion can only be derived from expanding our interpretation of the provision towards equality.

### 3. Equality between women and men

**26** The aim to be pursued under Article 23 is equality between women and men, a notion that goes beyond only prohibiting discrimination on grounds of sex (Article 21 CFR EU). Considering that women and men are also diversified by a number of other ascribed characteristics, including alleged race, ethnic origin, bodily capacity and being disabled by societies expectations, inequalities between women and men are also widely varied.

**27** With all these varieties inequalities between women and men can still be captured in general terms. It results from social processes resulting in durable inequalities<sup>34</sup> between those categorised as female and male respectively (women and men). These inequalities privilege men over women. Women are usually made to work more, earn less for the same amount of work and have more limited access to resources generally.<sup>35</sup> This is achieved by structuring the division of labour between women and men along the lines preordained by expectations of heterosexuality as the norm (hetero-normativity).<sup>36</sup> While the detail of inequalities between women and men differ between different societies, the burdening of women with more work, in particular more unpaid or low paid work, than men is common to societies in all EU Member States. To a large extent, this is achieved by women delivering more unpaid work in families, caring for children, the elderly and servicing men in their reproductive needs.<sup>37</sup> Inequalities between women and men also include sexualisation and emotionalisation of women, and the expectation that women endure physical violence, including sexual violence, and other restrictions of their physical integrity and personal liberty.<sup>38</sup>

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<sup>33</sup> Dagmar Schiek, 'Organising EU Equality Law Around the Nodes of 'Race', Gender and Disability', in *EU Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination*, ed. by Dagmar Schiek and Anna Lawson (Farnham: Ashgate, 2011), pp. 11-27 (p. 24).

<sup>34</sup> On the construction of durable inequalities through social interactions see Iris Marion Young, 'Structural Injustice and the Politics of Difference', in *Intersectionality and Beyond* (Oxon: Routledge-Cavendish, 2009), pp. 273-98 (p. 275).

<sup>35</sup> For the European Union, these indicators are reported in an annual report by the European Commission. The latest of these is available for 2011 (European Commission, Progress on equality between women and men in 2011, Brussels 2012, available at [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-2](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-2) . More recent data is available on the gender pay gap, i.e. the difference in remuneration for comparable work by sex, which is measured annually (European Commission, The Gender Pay Gap 2013, Brussels 2013, available from [http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/gpg\\_brochure\\_2013\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/gpg_brochure_2013_final_en.pdf)

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<sup>37</sup> The time use per gender is one of the worst documented indicators for gender (in)equality. Even for the European Union, this indicator is only available for a limited amount of countries, and for some years. The youngest data is of 2006 and shows that women work between 50 and 200 % more than men on domestic tasks ([http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-NK-06-004/EN/KS-NK-06-004-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-NK-06-004/EN/KS-NK-06-004-EN.PDF))

<sup>38</sup> Again, statistical capture of violence against women is incomplete. The EU Commission nevertheless provides an overview of the problem on a regular base, lastly for



**28** The EU and its predecessors have developed their approach to inequalities between women and men since 1957. From the beginning, equal pay of men and women was to be maintained by Member States. It is no secret that this obligation was initially driven by economic motives, and also by the need to align French ideas of harmonising social rights alongside economic integration with the German insistence that economic integration can and should go forward without social integration.<sup>39</sup> However, the EU has incrementally developed from viewing equality between women and men as a mere annex to economic integration towards appreciating the human rights dimension of the field. While the Court of Justice initially stated that economic and social motives have equal weight in the field,<sup>40</sup> it stated in 2000 that the human rights dimension prevailed as the most central on in the field.<sup>41</sup> The EU legislator has initially focused on the employment and occupation, including social security.<sup>42</sup> With expanding competences (above paragraph 2) it has also expanded gender equality legislation to new fields, such as access to goods and services.<sup>43</sup> Further, gender equality is an element of the OMC where the EU cannot wield legislative competences.<sup>44</sup>

**29** With all these developments, some doubt whether the Charter adds anything specifically.<sup>45</sup> It is submitted that Article 23 CFREU does constitute change. With its recognition as legally binding, equality between women and men has achieved the status of a human right. Further, the clause goes beyond the EU acquis developed in this fields in one other important aspect, namely in the order of words. While the Treaties and secondary legislation always relate to men and women (equal treatment of men and women, equal pay), the Charter reverses the order and speaks about equality of women and men. While the egalitarian principle is maintained, the change in order also constitutes a further milestone. Naming women first, the Charter acknowledges the **asymmetric character of sex inequality** to the detriment of women. Asymmetry of equality rights<sup>46</sup> is frequently used to support a reading that does not outlaw discrimination of the privileged group (or sex) in order to achieve equality in socio-economic reality. Such measures can be necessary to overcome the paradox of equality law: modern laws concerning equality and discrimination are not restricted to merely formal equality. They are more ambitious in pursuing the aim of changing socio-economic reality in

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<sup>39</sup> Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?', in *The Evolution of EU Law*, ed. by Paul Craig and Gráinne de Búrca, 1st edn (Oxford: Oxford University Press, 1999), pp. 517-53.

<sup>40</sup> ECJ 43/75 Defrenne II [1976] ECR 445, paras 9-10

<sup>41</sup> ECJ C-50/96 Schröder [2000] ECR I-743, para. 57

<sup>42</sup> Today, the most important directives in these fields are Directives 2006/54 on equal treatment of women and men in employment and occupation and Directive 79/80 on equal treatment of women and men in social security.

<sup>43</sup> Directive 2004/113/EC

<sup>44</sup> Fiona Beveridge and Samantha Velluti, *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Aldershot: Ashgate, 2008).

<sup>45</sup> Catheryne Costello, 'Gender Equality in the Charter of Fundamental Rights of the European Union', in *Economic and Social Rights Under the Eu Charter of Fundamental Rights: A Legal Perspective*, ed. by Tamara Hervey and Jeffrey Kenner (Oxford: Hart, 2003), pp. 111-37 (p. 112). Evelyn Ellis, 'The Impact of the Lisbon Treaty on Gender Equality', *European Gender Equality Law Review*, 2010, 7-13 (p. 11).

<sup>46</sup> On this see already Dagmar Schiek, 'Elements of a New Framework for the Principle of Equal Treatment of Persons in EC Law: Directives 2000/43/EC, 2000/78/EC and 2002/73/EC changing Directive 76/207/EEC in context', *European Law Journal*, 8 (2002), 137-57.



favour of those who have been at the receiving end of discrimination.<sup>47</sup> To achieve such change, formally neutral rules are not always sufficient. At times it is also necessary to grant privileges to those who have hitherto suffered detriment. Sometimes, taking away a privileged position will also be perceived as detriment, but at times even further positive action will be required. While Article 23 (2) provides a more specific rule on positive action, the wording of Article 23 (1) changes the conceptual base for such positive action by acknowledging that women are those suffering from detriment through its revised order of words. It thus suggests that positive duties and positive action are firmly based on a notion of asymmetry.

#### 4. Ensuring equality in all areas, including employment, work and pay

**30** In requiring the EU and its Member States to ensure equality, Article 23 (1) goes beyond an obligation to refrain from discrimination (Article 21) as well as a duty to respect diversity (Article 22). In the English discourse, the term “positive duties” is used for an obligation to ensure equality. These have recently been codified in the recent Equality Act,<sup>48</sup> after having given rise to a new philosophy of human rights based on doctrines of equality law.<sup>49</sup> In Continental Member States, the concept of positive state obligations to create preconditions for enjoyment of human rights is frequently derived from social state principles.<sup>50</sup> In addition, some Continental constitutions explicitly demand that equality between women and men must be ensured<sup>51</sup>.

**31** In international law this corresponds to the obligation to promote human rights. Relating to equality of women and men, the obligation to promote the factual conditions for the enjoyment of rights has first been linked to **gender mainstreaming** after the 1985 UN women summit<sup>52</sup> and was fully developed as an instrument during the 1995 UN summit on women.<sup>53</sup> The EU Commission had

<sup>47</sup> Dagmar Schiek, 'Torn between Arithmetic and substantive equality?', *International Journal of Comparative Labour Law and Industrial Relations*, 18 (2002a)), 149-68.

<sup>48</sup> On this see Bob Hepple, *Equality - The New Framework* (Oxford & Portland (Oregon): Hart, 2011) (pp. 134-40).

<sup>49</sup> Sandra Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008).

<sup>50</sup> See for an English language overview Stylianos-Ioannis Koutnatzis, 'Social rights as constitutional compromise: lessons from comparative experience', *Columbia Journal of Transnational Law*, 44 (2005), 74-133., for the German constitution see D Schiek, 'Artikel 20 Abs. 1-3 V: Sozialstaat', in *Alternativkommentar zum Grundgesetz* (Neuwied et al: Luchterhand, 2001), II.

<sup>51</sup> For example, under section 6 of the Finnish Constitution “Equality between the sexes is promoted in societal activity and working life”; under Article 1 of the French constitution “statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility”, under Article 3 (2) of the German constitution “the state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist”, under Article 114 of the Greek constitution the “state shall take measures for the elimination of inequalities actually existing, in particular to the detriment of women”; the Italian constitution stresses the obligation of the Republic and its regions to promote equal opportunity between women and men, and to remove hindrances to full equality of men and women in social, cultural and economic life, while also stressing women’s “essential role in the family” (Articles 37, 48, 51, 117). These quotes are taken from Jane Huckerby, 'Gender Equality and Constitutions of Europe and North America', in *Gender Equality and Constitutions. Comparative Provisions*, ed. by UN Entity for Gender Equality and the Empowerment of Women (Geneva: United Nations, 2012), pp. 1-68..

<sup>52</sup> Sevil Sümer, *European Gender Regimes and Policies* (Farnham: Ashgate, 2009) (p. 79).

<sup>53</sup> UN Fourth World Conference on Women (1995) Global Platform for Action – Beijing, New York United Nations Publishing Jill Rubery, 'Gender Mainstreaming and the OMC. Is the Open Method of Coordination too open for Gender Equality Policy?', in *The Open Method of Coordination in Action. The European Employment and Social Inclusion Strategies*, ed. by Jonathan Zeitlin and Paul Pochet (Brussels: PIE: Peter Lang, 2005).

actively contributed to the 1995 summit with a proposal, based on the appraisal of the gender mainstreaming strategy in its 3<sup>rd</sup> Action Programme for Equal Opportunities.<sup>54</sup> Immediately after the Beijing Platform had been adopted, EU Commission<sup>55</sup> and Council of Europe<sup>56</sup> documents established definitions of gender mainstreaming that are still quoted as decisive. According to these, gender mainstreaming constitutes a change in strategy in that women's equality is no longer pursued by specific instruments only, but rather through the incorporation of a gender equality perspective into developing, evaluating and improving any policy process.<sup>57</sup> The inclusion of the gender mainstreaming principle into primary EU law was achieved with the Treaty of Amsterdam, which established the wording of today's Article 8 TFEU (see above paragraph 20).

**32** However, Article 23 (1) CFREU once again goes beyond the established *acquis*. While under Article 8 TFEU the Union shall only aim to eliminate inequalities and to promote equality between men and women, Article 23 (1) CFREU demands that equality must be ensured. Thus, it is not sufficient to integrate a mere gender perspective and to strive for more equality. Instead, the obligation under Article 23 (1) is only fulfilled once a change in society has been achieved and secured which may well seem utopian today, given the gross inequality between women and men, which increases whenever there is some crisis leading to scarcity of resources.<sup>58</sup> This enhanced obligation might even quell some of the criticism of gender mainstreaming EU style, according to which gender mainstreaming is only successful for policies driven by such departments that are conscious of the needs of gender equality anyway<sup>59</sup> or is based on a reductionist approach attributing gender inequality to some economic habits mainly.<sup>60</sup> There is no doubt that a process-focused approach to overcoming inequalities between women and men is necessary, as a corollary to non-discrimination policies, if socio-economic reality should be changed.<sup>61</sup> If EU institutions are not only required to pay some attention to structures by attempting to overcome inequality, but are rather required to ensure equality, this structural perspective may actually yield success.

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<sup>54</sup> COM 90 (449) final

<sup>55</sup> Communication from the Commission to the Council: Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities COM (1996) 67

<sup>56</sup> Council of Europe: Gender Mainstreaming. Conceptual Framework, Methodology and Presentation of Good Practices. Strasbourg (available from [http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG\\_S\\_MS\\_98\\_2\\_rev\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG_S_MS_98_2_rev_en.pdf) - 3 March 2013)

<sup>57</sup> See for summaries and quotes from those instruments Fiona Beveridge and Samantha Velluti, *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Aldershot: Ashgate, 2008) (p. 17).; Ruth Nielsen, 'Is European Union equality law capable of addressing multiple and intersectional discrimination yet?', in *European Union Non-Discrimination Law - Comparative Perspectives on Multidimensional Equality Law* (London & New York: Routledge-Cavendish, 2009), pp. 29-52 (pp. 39-40).

<sup>58</sup> See Francesca Bettio and others, *The Impact of the Economic Crisis on the Situation of Women and Men and on Gender Equality Policies*, ed. by European Network of Experts on Gender Equality (Brussels: EU Commission, 2012).

<sup>59</sup> Sandra Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008) (pp. 192-4).

<sup>60</sup> C Booth and C Bennet, 'Gender Mainstreaming in the EU: Towards a New Conception and Practice of Equal Opportunity?', *European Journal of Women's Studies*, 9 (2002), 430-46 (p. 441).; Kevät Nousiainen, 'Utility-based equality and disparate diversities: from a Finnish Perspective', in *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, ed. by Dagmar Schiek and Victoria Chege (New York: Routledge, 2009), pp. 187-214 (pp. 190-92).

<sup>61</sup> Accordingly, there are also optimistic assessments of the EU gender mainstreaming strategy. Silvia Walby, 'Gender Mainstreaming. Productive Tensions in Theory and Practice', *Social Politics*, 12 (2005), 321-43.

**33** The more assertive formulation of Article 23 (1) CFREU if compared with Article 8 TFEU requires more than considering gender equality in policy formulation. If inequalities between women and men persist, ensuring equality may require taking specific measures in favour of overcoming detriments that women face. The positive obligation to ensure equality of women and men aims at socio-economic reality, frequently also referred to as **substantive equality** or **transformative equality**.<sup>62</sup> Overcoming inequalities between women and men “in all areas” requires that the EU and its Member States strive for such equality rather than only supporting formal approaches to equal treatment. Article 23 (1) demands mainstreaming the obligation to ensure equality applies to all areas, while employment, work and pay are the ones stressed explicitly. The latter is in line with the origins of the EU’s gender equality policies (above paragraph **28**), but the Charter also clarifies that this is today only one fraction of the areas in which equality of women and men must be ensured. This obligation rests on all institutions, the judiciary in interpreting non-discrimination and other law as well as the legislator in adopting new legislation and the EU Commission in developing policies.

**34** As far as the **legislation and policy development** are concerned, Article 52 CFREU may lead to doubts whether the prospective duty to take measures in the future, is open to judicial review (or “justiciable” in the words of the Comments to the Charter). However, if the EU has taken legislative measures, these must at the same time ensure equality between women and men. Thus, to name but one example, the neglect to provide for considering the specific situation of women in the Directive on unwelcome migrants is not only worthy of academic critique,<sup>63</sup> but also constitutes a violation of Article 23. Further, the EU Commission and the Council are also bound by Article 23 when engaging in policy coordination without binding legal effects. With the legally binding effect of the Charter, the question how gender mainstreaming has been applied in the Open Method of Coordination<sup>64</sup> has become a constitutional one.

**35** Article 23 (1) also binds the **judiciary**, including the Court of Justice, and the national courts in Member States when applying EU law. Their responsibility to ensure equality between women and men in all areas impacts upon the interpretation of all EU law. This includes interpreting non-discrimination clauses in the Charter itself as well as in other EU law, including Articles 18, 157 TFEU and secondary law based on Articles 19 and 157 (3) TFEU. The obligation to ensure equality can only be achieved if substantive and possibly transformative equality is safeguarded when applying **EU sex discrimination law**.<sup>65</sup> Within sex discrimination law, the prohibition of indirect discrimination has been discussed as one which is closely linked to substantive equality.<sup>66</sup> The concept of indirect discrimination, in short, states that discrimination may exist even if a rule or practice does not explicitly refer to, for example, sex, but results in practice in excluding women (or men) disproportionately from advantages. Prohibiting indirect discrimination may serve to prevent circumvention of a prohibition of direct discrimination, which is unrelated to substantive equality. However, targeting the practical

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<sup>62</sup> The different notions of equality are considered in the commentaries on Articles 20 (Bell) and 21 (Kilpatrick).

<sup>63</sup> Heli Askola, 'Illegal Migrants', Gender and Vulnerability: The Case of the EU Returns Directives', *Feminist Legal Studies*, 18 (2010), 159-78.

<sup>64</sup> Fiona Beveridge and Samantha Velluti, *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Aldershot: Ashgate, 2008).

<sup>65</sup> On this notion see already Ruth Nielsen, 'Is European Union equality law capable of addressing multiple and intersectional discrimination yet?', in *European Union Non-Discrimination Law - Comparative Perspectives on Multidimensional Equality Law* (London & New York: Routledge-Cavendish, 2009), pp. 29-52 (pp. 40-42).

<sup>66</sup> Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law*, 2nd edn (Oxford: Oxford University Press, 2012) (pp. 142-43)..

effects of a rule, beyond its motives and even its wording, is also related to socio-economic reality, and thus based on a social engineering perspective.<sup>67</sup> Based on the assumption that inequality between women and men is entrenched in social reality, any rule reinforcing this inequality is *prima facie* suspect, and discrimination is assumed. After the harmonisation of EU sex equality law with non-discrimination law on other grounds, indirect sex discrimination is now deemed to exist “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.<sup>68</sup> This definition does not necessarily require statistical evidence, which makes proving indirect discrimination easier. On the other hand, it also seemed to introduce an element of comparison into the definition, which threatened to undermine the efficiency of the concept for achieving substantive equality. For example, the Court had held that women on on-call employment contracts were not comparable with employees on more secure contracts,<sup>69</sup> and stated that women and men on parental leave were not comparable with men absent from work for their military service.<sup>70</sup> This meant that the lower levels of protection against dismissal of workers on parental leave and against overly long working times of workers on on-call contracts could not be challenged under the prohibition of indirect discrimination, although these detriments affected women disproportionately. This again means that the prohibition of indirect discrimination is deprived of its effectiveness especially in cases where its application would contribute to challenging gender stereotypes, such as that that military service is in the public interest while caring for children within the family is merely in one’s private interest, or that workers on flexible part time employment contracts are probably secured elsewhere (through their family relations) and thus less worthy of protection.<sup>71</sup> The wording of the provisions defining indirect discrimination is sufficiently ambiguous as to allow a more comprehensive reading, which would also allow accommodating substantive equality. Such a reading would now be demanded by Article 23 (1) CFREU, and can be read as not establishing the so-called comparator approach.<sup>72</sup> Other elements of sex discrimination law are also considered as being based on substantive equality. These include the equation of sexual harassment with discrimination, and the provision allowing limited positive action measures.<sup>73</sup>

**36** A further field in which the requirement to ensure equality between women and men can lead to purposive interpretation of EU non-discrimination law is the field of **intersectional disadvantage**. So

<sup>67</sup> These deliberations have been developed in more breadth in Dagmar Schiek, 'Indirect Discrimination', in *Cases, Materials and Text on International, Supranational and National Non-Discrimination Law* (Oxford & Portland (Oregon): Hart, 2007), pp. 323-476 (pp. 327-31).

<sup>68</sup> Directive 2006/54/EC Article 2 1. (b) for employment related discrimination, Article 2 (b) Directive 2004/113/EC for other areas

<sup>69</sup> ECJ C-313/02 Wippel v Peek & Cloppenburg [2004] ECR I-9483

<sup>70</sup> eCJ C-220/02 Österreichischer Gewerkschaftsbund (ÖGB), Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich [2004] ECR I-5907

<sup>71</sup> See for a critique of these rulings, with further references, Dagmar Schiek, 'Indirect Discrimination', in *Cases, Materials and Text on International, Supranational and National Non-Discrimination Law* (Oxford & Portland (Oregon): Hart, 2007), pp. 323-476 (pp. 468-71)., with a similar turn see also Ann Numhauser-Henning, 'EU sex equality law post Amsterdam', in *Equality Law in an Enlarged European Union*, ed. by Helen Meenan (Cambridge: Cambridge University Press, 2007), pp. 145-76 (pp. 169-70).

<sup>72</sup> On this see Kilpatrick/Bell above ###

<sup>73</sup> Teresa Freixes, 'Article 23. Egalité entre hommes et femmes', in *Commentary of the Charter of Fundamental Rights of the European Union*, ed. by EU Network of Independent Experts on Fundamental R (Brussels: European Commission, 2006), pp. 200-08 (p. 201. 203).

far, EU non-discrimination legislation protects against discrimination on the basis of six grounds (sex, ethnic and racial origin, religion and believe, age, disability, sexual orientation); Article 21 CFREU adds colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth as well as any other ground. Accordingly, discrimination on more than one ground is increasingly likely to be covered by EU non-discrimination law. Such discrimination is increasingly debated in socio-legal theory as intersectional disadvantage,<sup>74</sup> while the EU institutions and EU secondary legislation prefer the term “multiple discrimination”.<sup>75</sup> The term intersectionality was first introduced by Crenshaw<sup>76</sup> in order to characterise the specific disadvantage suffered by women of colour which could not be explained by a mere addition of sex and race discrimination and overall tended to be overlooked by the law. The term has hence been used to characterise exactly this: the specific disadvantage suffered by those discrimination on more than one ground. In recent years, there has been a legal policy debate in the European Union on whether specific legislation is needed in order for EU law to address intersectional discrimination of women.<sup>77</sup> On the other hand, there is scope for a teleological interpretation of the body of EU anti-discrimination legislation to the effect that these directives already entail a prohibition of intersectional discrimination.<sup>78</sup> Clearly the latter interpretation would be in line with the Court’s tradition of purposive interpretation. It would also seem to be demanded by the need to promote equality between women and men. This derives from the deliberation that discrimination works in asymmetrical ways generally, and that sex discrimination works asymmetrically to the detriment of women. Thus, while each human being simultaneously has a gender, an ethnicity, an age, a sexual orientation and a religious belief (which may be atheism), not everyone suffers from discrimination in all these dimensions in equal measure. Women will suffer more from sex discrimination than men, those deemed to belong to an ethnic minority suffer more from discrimination on grounds of ethnic origin, those with darker skin colours suffer more from racial discrimination than those of lighter skin colour, and those loving the opposite sex suffer from less discrimination than those whose partner is of the same sex. Considering intersectional discrimination, this asymmetry leads to women suffering more frequently from this phenomenon than men. While a white man considered disabled but not considered as belonging to a minority religion or as being gay will only suffer from disability discrimination, a white woman in the same situation will suffer from discrimination at the intersection between disability and gender. This applies to the comparison between a black man not deemed disabled, gay or of minority religion and a black woman in the same situation as well as to numerous other combinations.

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<sup>74</sup> Evelyn Grabham and others, *Intersectionality and Beyond* (Oxon: Routledge-Cavendish, 2009).; Dagmar Schiek and Anna Lawson, *EU Non-Discrimination Law and Intersectionality – Investigating the Triangle between Racial, Gender and Disability Discrimination* (Aldershot: Ashgate, 2011), pp. 12-27.

<sup>75</sup> See, for example, Recital 17 Directive 2000/43 and Recital 19 Directive 2000/78

<sup>76</sup> Kimberle Crenshaw, 'Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', in *University of Chicago Legal Forum* ([n.p]: [n.pub.], 1989), pp. 139-67.

<sup>77</sup> See for a summary Mark Bell, 'Advances in EU Anti-Discrimination Law: The EU Commission's 2008 proposal for a new directive', *The Equal Rights Review*, 3 (2008), 7-18., Dagmar Schiek and Jule Mulder, 'Intersectionality and EU Law: A Critical Appraisal', in *EU Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, ed. by Dagmar Schiek and Anna Lawson (Farnham: Ashgate, 2011), pp. 259-73.

<sup>78</sup> Dagmar Schiek, 'Broadening the Scope an the Norms of EU Gender Equality Law: Towards a Multi-dimensional Conception of Equality Law', *Maastricht Journal of European and Comparative Law*, 12 (2005), 427-66.; Bob Hepple, *Equality - The New Framework* (Oxford & Portland (Oregon): Hart, 2011) (p. 62).

Denying victims of intersectional discrimination the protection of EU non-discrimination law thus clearly results in more women lacking protection than men.

**37** Another example of how EU sex discrimination law can contribute to ensuring equality between women and men is the openness for positive action. In so far as paragraph 2 does not alter the wording of existing provisions in Treaty and secondary law, paragraph 1 demands a purposive interpretation of its wording reflecting the asymmetric character of sex inequality.

## II. Paragraph 2

“The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.”

### 1. Origins

**38** According to the Charter explanations, Article 23 (2) originates from the Treaty provision Article 157 (4) TFEU). Article 157(4) TFEU reads: “With a view to securing full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” This provision again has a specific history. It was inserted into the Treaty of Amsterdam after a particularly controversial ruling by the Court of Justice on so called positive action in favour of women. The **Kalanke** ruling<sup>79</sup> of 1995 concerned a rule specific to career development in German public services.<sup>80</sup> The German constitution binds public employers to a specific equality clause, which demands for the merit principle to guide any decision on employment or promotion (Article 33 (2) German Constitution). Accordingly, the person who is best qualified under a predefined set of qualifications, as assessed by public examinations or by in-post assessment following strictly formal rules, must always prevail. These rules resulted in male dominance in senior positions, which motivated the city of Hamburg to task a former judge at the Constitutional Court with drafting potential positive action measures.<sup>81</sup> The judge came up with a “tie break rule”: in order to overcome persistent underrepresentation of women, women could be preferred over equally qualified male competitors in employment and promotion until there were as many women as men in the relevant pay bracket.

**39** Arguably this tie break rule was introduced instead of requiring personnel managers to abstain from structural discrimination which was quite usual. For example, in-post assessments traditionally tended to converge on the same grade after employees or civil servants had achieved certain seniority. As a consequence, choices for promotion were made on the base of “auxiliary criteria”, mainly comprising seniority and number of dependants. Due to strict gender role expectations, the percentage of female employees in the public sector who were responsible for more than one dependant was very low: they would have one dependent if their husband would earn less than themselves, or if they were unmarried mothers. Married male employees would typically have three dependants: a wife, if earning only slightly less than the husband and two children. Seniority too tended to favour

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<sup>79</sup> ECJ C-450/93 *Kalanke* [1995] ECR I-3051

<sup>80</sup> For more detail on this see Dagmar Schiek, 'Sex Equality Law after Kalanke and Marschall 4 (2) European Law Journal, 148 - 168', *European Law Journal*, 4 (1998), 148-68.

<sup>81</sup> Ernst Benda, *Notwendigkeit und Möglichkeit von positiven Massnahmen zugunsten von Frauen im Öffentlichen Dienst* (Hamburg: City of Hamburg, 1986).

males in in male dominated sectors, as women had only been given a chance much more recently. The City of Bremen had dared to disable these indirectly discriminatory criteria in favour of a tie break rule. Thus, Mr Kalanke, a married father of two children, expected to be promoted before Ms Glissman, who was younger and without children and had less seniority (despite having more professional experience, partly accumulated in the private sector). This was very important to him at the time, because any promotion after his 60<sup>th</sup> birthday would not have given him a final salary pension. Understandably, he challenged the decision to promote Ms Glissman who had been assessed as equally qualified.

**40** The Court of justice based its ruling on Directive 76/207 (since superseded by Directive 2006/54), which established the principle of equal treatment between men and women in employment and occupation. It also contained a clause that was meant to allow positive action, Article 2 (4). This clause read: “This directive shall be without prejudice to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women’s opportunities”. The Court only focused on the unequal treatment on grounds of sex, without considering the discriminatory policies which were replaced by the “tie break rule”. It enounced that “a national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are underrepresented involves discrimination on grounds of sex. (...) As a derogation from an individual right laid down in the Directive, Article 2 (4) must be interpreted strictly (...) A national rule which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunity and overstep then limits of the exception in Article 2 (4) of the Directive”.<sup>82</sup> Thus it was held that the city of Bremen should have preferred Kalanke on the basis of having a dependent wife and two children, although his professional experience was less extensive. The city decided to reassess the qualification of both candidates through an extensive interview, which resulted in Ms Glissman being considered as better qualified to fill the post. Had the City relied on independent experts instead of peer review within the same unit from the start, there would have been no case of positive action. Possibly, such a policy change would have removed discrimination contravening the principle of equal treatment of women and men in the first place.

**41** As it was, the case roused considerable discussion,<sup>83</sup> including in political circles. The imminent negotiation of the Treaty of Amsterdam was utilised to draft and pass an addition to Article 119 EEC, later renumbered to Article 141 EEC, which is now contained in Article 157 (4) TFEU (text quoted above paragraph **38**). Article 2 (4) Directive 76/207 remained unchanged for the time being. This led to juridical debate on whether Article 141 (4) TEC (now: Article 157 (4) TFEU) allowed more scope for positive action measures than the directive.<sup>84</sup>

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<sup>82</sup> ECJ C-450/93 Kalanke [1995] ECR I-3051, paragraphs 16, 19, 21

<sup>83</sup> The list of case annotations maintained by the Court of Justice lists no less than 83 annotations ([http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/notes\\_89-04.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/notes_89-04.pdf), pp 217-220), see for example Helen Fenwick, 'Perpetuating Inequality in the Name of Equal Treatment', *Journal of Social Welfare and Family Law*, 18 (1996), 263-70. and Louis Charpentier, 'L'arrêt Kalanke. Expression du discours dualiste de l'égalité', *Revue trimestrielle de droit européen*, 1996, 281-303..

<sup>84</sup> See on this historical phase Olivier de Schutter, 'Positive Action', in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. by Dagmar Schiek, Lisa Waddington and Mark Bell (Oxford & Portland (Oregon): Hart, 2007), pp. 757 - 870 (pp. 807-809 with further references).



## 2. The Court's subsequent case law

**42** Two subsequent rulings on the German public service somehow softened the rigidity of this very first case. In **Marschall**, the Court decided that a tie break rule could be upheld if it contained a “savings clause to the effect that women are not to be given priority in promotion if reasons specific to a male candidate tilt the balance in his favour”.<sup>85</sup> In this case, the Court considered realistically that “where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently”.<sup>86</sup> It even realised that “the mere fact that female and male candidates are equally qualified does not mean that they have the same chances”,<sup>87</sup> and concluded that “a national rule in terms of which, subject to a savings clause, female candidates for promotion who are equally as qualified as male candidates are to be treated preferentially in sectors where they are underrepresented may fall within the scope of Article 2 (4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above”,<sup>88</sup> before stressing that the restrictions laid down in *Kalanke* continued to apply.<sup>89</sup> The Court did not refer to Article 141 (4) EC, but only relied on Article 2 (4) Directive 76/207.

**43** The **Badeck** case, decided in 2000,<sup>90</sup> was even more interesting, in that it covered a wide range of positive action measures. The legislation at stake contained binding targets for increasing the proportion of women employees in sectors where they had been underrepresented in the past, leaving the way to achieve those targets to the employer. The employer, however, remained bound by the merit principle quoted above. Accordingly, it could only ever prefer women over men if they were at least equally qualified.<sup>91</sup> Further, the legislation contained two cases of strict quotas. For fixed term positions in universities, which served as a base to obtain a PhD or a Habilitation<sup>92</sup>, the legislation established binding targets. Universities had to employ women as PhD researchers to the same percentage which they established among those graduates in the relevant subject who qualified for PhD research. For Habilitation, the same principle applied. This binding target was accepted, under the assumption that women could only be preferred if equally qualified.<sup>93</sup> The Court also sanctioned a strict quota for training places, referring to the fact that these were not employment opportunities, but rather opportunities to obtain employment, without demanding equal qualification for these posts.<sup>94</sup>

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<sup>85</sup> ECJ C-409/95 *Marschall* [1997] ECR I-6363, paragraph 27

<sup>86</sup> Paragraph 29

<sup>87</sup> Paragraph 30

<sup>88</sup> Paragraph 31

<sup>89</sup> Paragraph 32-33.

<sup>90</sup> ECJ C-158/97 *Badeck* [2000] ECR I-1875. See on this case Dagmar Schiek, 'Positive Action before the European Court of Justice - New Conceptions of Equality in Community Law', *International Journal for Comparative Labour Law and Industrial Relations*, 16 (2000), 251-75.

<sup>91</sup> Paragraphs 33, 36-38

<sup>92</sup> The Habilitation constitutes a higher level PhD, traditionally a requirement for obtaining professorial office in addition to a PhD (e.g. in Germany, Sweden, Denmark, Poland and other Eastern countries).

<sup>93</sup> Paragraph 41

<sup>94</sup> Paragraphs 51-54



**44** The Court further limited the scope for positive action again in the **Abrahamsson** case,<sup>95</sup> concerning a Swedish rule under which employment of professors in subjects where they were grossly underrepresented could waive the requirement that the female professor should be equally qualified with the male professor. The Court of Justice held that such a rule went beyond the scope allowed by Directive 76/2007 and Article 141 (4) EC. However, the Court stressed that there was ample scope of changing selection criteria in such a way as to prefer criteria that would benefit women.<sup>96</sup>

### 3. Scope for development under Article 23 (1) and (2)

**45** Positive action is a potential way to achieve substantive equality in favour of women, who suffer the brunt of sex discrimination. However, the Court's case law does not seem conducive to developing those instruments further. The question to be discussed in the remaining space for this provision concerns the prospective development of positive action under the new charter provision.

**46** Initially a few remarks on **notions of positive action** seem adequate. There is some debate on whether positive action includes measures that are not necessarily in breach of formal equality principles. A frequently quoted article by McCrudden<sup>97</sup> included a number of measures that were intended to overcome inequalities, but did not constitute unequal treatment based on sex, starting with eradicating unlawful discrimination. Further layers of positive action included "purposefully inclusive policies" and "outreach measures". Both categories may not go beyond overcoming indirect discrimination, e.g. if advertisements for employment and/or training opportunities are placed where they will also be seen by women, rather than in places mostly frequented by men. Outreach programmes can also include special training and information opportunities for women. Further, re-defining merit is brought forward as an important element. However, this too falls within the category of eradicating unlawful discrimination. If, for example, experiences acquired by managing a family are valued in the same way as experiences acquired while managing a sports team, this only eliminates unjustified preference for experiences more typically acquired by men than by women and the unjustified disregard for experiences more typically acquired by women than by men. Only as the last resort, preferential rules are propagated. This categorisation can be useful in a legal environment which prohibits real positive action, consisting of temporary advantages as mentioned by Article 4 CEDAW. However, it seems exaggerated to characterise lawful behaviour (eliminating discrimination) as positive action. The term "positive action" should be reserved for measures opening up additional opportunities for women, and at the same time impacting upon opportunities for men.

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<sup>95</sup> ECJ C-407/98 *Abrahamsson* [2000] ECR I-5539, see also the parallel ruling on a Norwegian case by the EFTA court E-1/02 [2004] CMLRev 245 with annotation by Ch. Tobler. These cases prompted a specific conference and subsequent publication "*Aiming High – Falling Short?*" *Women in Academia and Equality Law*, ed. by Ann Numhauser-Henning (The Hague: Kluwer Law International, 2006).

<sup>96</sup> On such strategies see Olivier de Schutter, 'Positive Action', in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. by Dagmar Schiek, Lisa Waddington and Mark Bell (Oxford & Portland (Oregon): Hart, 2007), pp. 757 - 870 (pp. 818-20).

<sup>97</sup> Christopher McCrudden, 'Rethinking Positive Action', *Industrial Law Journal*, 19 (1986), 219-43.

<sup>98</sup> This view is shared by Olivier de Schutter, 'Positive Action', in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. by Dagmar Schiek, Lisa Waddington and Mark Bell (Oxford & Portland (Oregon): Hart, 2007), pp. 757 - 870 (pp. 772-75).

**47** It is not necessary that the opening up of opportunities relates to equally qualified candidates though.<sup>99</sup> This specific requirement, which seems to permeate the Court's case law on access and promotion quotas, derives from specific obligations of public employers under some national legislation. However, not all employers are required to choose the best qualified candidate under some objectively assessed catalogue of criteria. It is much more typical that employers maintain some discretion, which allows them to assemble a range of abilities in their teams. Similarly, schools, universities, teams for cultural activities or sports clubs should not have to apply predefined merit criteria to avoid discrimination claims. As we have seen, the Court of Justice has waived the qualification criterion for training posts in the *Badeck* case.<sup>100</sup> The same case also debated quota rules for collective bodies. Although the Court proceeded on the assumption that the relevant paragraph of the disputed legislation was not binding, the short reasoning is still worth mentioning. The Court concedes that different measures could apply for bodies that are established by election, thus suggesting that merit based on formal qualification is not the only way of deciding about access to positions.<sup>101</sup>

**48** Developing positive action for a range of fields may not profit from limiting admissible selection criteria to formally assessed qualifications. The recent Commission proposal **for representation of women on company boards**<sup>102</sup> constitutes a good example for the detriments of the present doctrine, which is based on a very limited number of cases concerning public employers. The disputed Commission proposal not only sets a quota for non-executive company directors, but also imposes upon companies the establishment of qualification criteria. Thus, it excludes the election of non-executive directors by shareholders or workers' representatives, which constitutes an element of industrial relations in a number of Member States. The proposal thus seems overly narrow in its perception of equality between women and men. Relying on a limited set of cases which all were based in public sector employment, it assumes that pre-defined merit is always the best criterion to fill positions. Allowing for the opportunity to apply a quota to the lists of candidates from which non-executive company directors are elected would have been a less intrusive way of adopting positive action measures more adequate to the sector's practices in all Member States.<sup>103</sup>

**49** More flexibility in relation to positive action measures than allowed by the Court of Justice in its four scarcely reasoned rulings on the matter is demanded not only by the principles developed for Article 23 (1) CFREU, which must be referred to as guidance when applying Article 23 (2). Further, international law obligations relating to temporary special measures aimed at accelerating de facto equality of women and men under the **CEDAW** (above paragraph 16).<sup>104</sup> The CEDAW Committee has

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<sup>99</sup> This is the proposition made by Olivier de Schutter, 'Positive Action', in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. by Dagmar Schiek, Lisa Waddington and Mark Bell (Oxford & Portland (Oregon): Hart, 2007), pp. 757 - 870 (pp. 775-77).

<sup>100</sup> Above paragraph 44

<sup>101</sup> ECJ *Badeck* paragraphs 65-66.

<sup>102</sup> European Commission, Proposal for a Directive improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures COM (2012) 614 fin

<sup>103</sup> On the different national rules to achieve the same aim see Christina Tvarnø, 'Women quotas on company boards in Scandinavia and the EU', in *Scandinavian Women's Law in the 21st Century*, ed. by Ruth Nielsen and Christina Tvarnø (Copenhagen: DJØV, 2012), pp. 265-83.

<sup>104</sup> See on these deliberations Rikki Holtmaat and Christa Tobler, 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination', *Maastricht Journal of European and Comparative Law*, 12 (2005), 399-425., Lisa Waddington and Laura Visser, 'Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?', in *The Women's Convention Turned 50*, ed. by Ingrid Westendorp (Cambridge: Intersentia, 2012), pp. 33-63.

repeatedly stressed that state parties may be under an obligation to at least provide adequate explanations for not adopting temporary special measures if they have not achieved any acceleration of de-facto equality of women and men.<sup>105</sup> This is closely related to the fact that under CEDAW temporary special measures are not considered as an exception from the principle of equality, but rather as a precondition to achieve the aims pursued under this principle. This does not prevent the CEDAW Committee from stressing that state parties must take appropriate measures to ensure that temporary special measures do not conflict with constitutional equality principles. However, in stark contrast to the Court of Justice it prefers a balancing of accelerating de facto equality of women and the constitutional demands of equality. This balancing is mainly achieved by the temporary character of the special measures and by making every effort to tailor the measures to the specific aims to be achieved. For example, this would also require to allow a wider range of positive action measures in training than in employment, as acknowledged by the Court of Justice in his Badeck ruling. These principles would also demand to develop tailored measures for allowing improvement of women's representation among those elected as non-executive company directors, e.g. by trade unions.

**50** Overall, the restrictive case law of the Court of Justice on positive action, as established in four judgements mainly relating to public employment is not adequate for developing tailored positive action measures for "all areas", as demanded by Article 23 (1) CFREU and the international law bases of this provision. Article 23 (2) is worded sufficiently open as to be interpreted in line with the first paragraph of the same provision as to allow a wider range of positive action measures than merit-focused tie break rules for promoting public servants. The new provision should be read in a holistic way and taken as a starting point for developing a wider arsenal of temporary special measures to achieve de-facto equality of women and men.

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<sup>105</sup> In particular recommendation no 23 and 25, reprinted in Olivier de Schutter, 'Positive Action', in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed. by Dagmar Schiek, Lisa Waddington and Mark Bell (Oxford & Portland (Oregon): Hart, 2007), pp. 757 - 870 (pp. 783-86).

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